

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE:
BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL NO. 2406)**

Master File No. 2:13-CV-20000-RDP

This document relates to:

2:12-cv-02532

2:15-cv-01345

2:15-cv-01346

2:15-cv-01347

2:15-cv-01348

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2:15-cv-01475

2:15-cv-01550

2:15-cv-02295

OPPOSED

VERIFIED MOTION FOR PRELIMINARY INJUNCTION

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Exhibit	Document	Description
A.	Compass Lexecon Rep. (PID Docket No. 1401)	Economic Analysis of Highmark's Affiliation with WPAHS and Implementation of an Integrated Health Delivery System April 4, 2013
B.	Approving Determination and Order	In Re: Application of UPE for Approval of the Request by UPE to Acquire Control of Highmark Inc., et al.
C.	Findings of Fact and Conclusions of Law	In Re: Application of UPE for Approval of the Request by UPE to Acquire Control of Highmark Inc., et al.
D.	Letter dated 7/28/2017	Letter from T. Miller to J. Stover
E.	Letters dated 5/14/2014 & 5/15/2014	Letters from D. Farner to BCBSA Plans
F.	Letter dated 5/20/2014	Letter from S. Nehs to D. Farner
G.	Email dated 5/22/2014	Email from R. Noonan to D. Farner
H.	Letter dated 7/31/2014	Letter from A. Jarvis to D. Farner
I.	Letter dated 8/7/2014	Letter from D. McIntyre to D. Farner
J.	Letters dated 4/23/2018	Letters from D. Farner to BCBSA Plans

Exhibit	Document	Description
K.	Letter dated 5/1/2018	Letter from D. Rice to BCBSA Members
L.	Letter dated 7/30/2014	Letter from D. Farner to BCBSA Members
M.	Email dated 2/4/2019	Email from J. Chuba to R. Mornelli
N.	Attorney general, UPMC playing hardball - Opinion	https://www.goerie.com/opinion/20190210/pat-howard-attorney-general-upmc-playing-hardball

Certain University of Pittsburgh Medical Center (“UPMC”) hospitals, UPMC East, UPMC Hamot, UPMC Magee-Womens Hospital, UPMC McKeesport, UPMC Mercy, UPMC Passavant, UPMC Presbyterian Shadyside, and UPMC St. Margaret (the “UPMC Hospitals”) request entry of a preliminary injunction enjoining the Defendants other than Highmark Health Services (“Defendants”) from enforcing or complying with their market allocation agreements, which this Court has held are “directly comparable to the license conditions enacted by the defendants in *Sealy and Topco*.” *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1269 (N.D. Ala. 2018) (“*In re Blue Cross*”).

UPMC, a world-renowned healthcare provider, has long treated members of Blue plans other than Highmark Health Services, in whose exclusive service area UPMC is primarily located.¹ On June 30, 2019, a consent decree that allows certain Highmark patients (and thus non-Highmark Blues patients as well) to seek treatment at the UPMC Hospitals will expire. Non-Highmark Blues could contract directly with the UPMC Hospitals but for their agreement not to compete—a *per se*

¹ Highmark Health Services is a subsidiary of Highmark, Inc., which has other subsidiaries that operate in Delaware and West Virginia. This motion will refer to Highmark Health Services as “Highmark.” Members of plans insured or administered by Blues other than Highmark Health Services will be referred to as “non-Highmark Blues patients.” Many non-Highmark Blues patients live in Highmark’s exclusive service area, while others travel from outside that service area for treatment at UPMC.

violation of the Sherman Act.² For example, Blue Cross and Blue Shield of Alabama advised that “[a]s a member of the Blue Cross Blue Shield Association, we cannot contract directly with providers not in our service area.”

So that there is no misunderstanding, the UPMC Hospitals are willing to continue to provide services to the members of the Blues using the same rates that they currently charge Highmark for in-network services—rates that Highmark proposed, and an arbitration panel chose, in a last, best-offer arbitration between UPMC and Highmark. If the Blues other than Highmark agreed to contract with UPMC, they could actually save money because they would pay the same rates that they have been paying without paying BlueCard fees to Highmark.

Without a preliminary injunction, the reputation of the UPMC Hospitals will be harmed, and they will no longer be able to treat non-Highmark Blues patients on an in-network basis. Accordingly, UPMC is entitled “to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws.”

15 U.S.C. § 26.

² There are two narrow exceptions. First, UPMC Hamot has entered a contiguous county contract with HealthNow/BCBS-Western New York. That contract is not subject to BlueCard and will only be for HealthNow members. Second, UPMC Presbyterian Shadyside will remain in network with the various Blues for Live Donor Liver, Heart-Lung, Small Bowel and Lung transplant services and Cystic Fibrosis services under a separate agreement with Highmark. That agreement expressly provides that these services will also be in network for all Blue Cross Blue Shield members.

FACTS

A. UPMC

1. UPMC operates 40 academic, community and specialty hospitals, and 700 doctors' offices and outpatient sites; employs 4,800 physicians; and offers an array of rehabilitation, retirement, and long-term care facilities. It is the largest non-governmental employer in Pennsylvania, with 87,000 employees.

2. Affiliated with the University of Pittsburgh Schools of the Health Sciences, UPMC Presbyterian Shadyside ranks No. 12 in the U.S. News & World Report annual Honor Roll of America's Best Hospitals with 14 adult specialties ranked. It has world-renowned centers of excellence in transplantation, cancer, neurosurgery, psychiatry, rehabilitation, geriatrics, and women's health.

3. UPMC depends on its excellent reputation to attract top-tier residents and fellows and to establish relationships with a broad range of referring physicians.

4. Patients from all over the world come to UPMC facilities and physicians to seek treatment due to its outstanding reputation. Each year, UPMC treats more than 30,000 patients a year who have traveled from outside the region for the services at UPMC. Race car driver Dale Earnhardt, Jr., Swedish soccer

player Zlatan Ibrahimovic, and World Series champion catcher David Ross³ have all made the journey to Pittsburgh to receive care at UPMC. Every year, UPMC also treats tens of thousands of non-Highmark Blues patients who reside in western Pennsylvania.

5. All of the UPMC Hospitals are located in Highmark's exclusive 29 county area in western Pennsylvania. Seven of the UPMC Hospitals are located in Allegheny County, Pennsylvania. One is located in Erie County, Pennsylvania. As detailed below, Highmark owns and operates hospitals that compete with the UPMC Hospitals in those counties. The UPMC Hospitals internally estimate that approximately 24% of their Blue patients are members of Blues other than Highmark.

B. The Impact of Highmark's Decision to Acquire West Penn Allegheny Health System, the Provider System that Competes Directly with the UPMC Hospitals.

6. There has been a longstanding dispute between UPMC and Highmark based on Highmark's 2011 decision to acquire a financially struggling hospital system, the West Penn Allegheny Health System (now known as the Allegheny Health Network ("Allegheny")) that competes directly with the UPMC Hospitals. Highmark's acquisition of Allegheny transformed Highmark from a traditional

³ Each of these UPMC patients has approved the use of their name in UPMC marketing.

insurer into an integrated health care system (insurer and provider) that now competes directly with UPMC, which is also an integrated payer-provider system.

7. Once it learned of Highmark's plan to acquire the Allegheny hospitals, UPMC sent Highmark notice of its intent to terminate the UPMC Hospital contracts with Highmark. UPMC knew that Highmark would have a financial imperative to mislead and confuse consumers into believing they have in-network access to the UPMC Hospitals only to divert those consumers into the financially struggling Allegheny hospitals.

8. After intervention by the Pennsylvania Governor in May 2012, UPMC agreed to postpone the termination of its contracts with Highmark until December 31, 2014. Nevertheless, UPMC's concerns about Highmark's designs to divert patients from the UPMC Hospitals to Allegheny were confirmed in early 2013. To acquire Allegheny, Highmark required the approval of the Pennsylvania Insurance Department ("PID") and was obligated to submit business plans and projections to PID in support of its bid. Highmark's projections, which were released in early 2013, revealed that Highmark needed to divert 41,135 inpatient admissions annually from UPMC and community hospitals into the Allegheny hospitals. Exhibit A, Compass Lexecon Rep. (PID Docket No. 1401) at 148. UPMC would be the "primary source of [Allegheny's] incremental discharges." *Id.* at 126.

9. Although the PID approved Highmark's acquisition of Allegheny, the PID and its consultant experts understood that the success of Highmark's integrated system was predicated on Highmark severing its ties with the UPMC Hospitals located in Allegheny County and ultimately, Erie County, as well. So long as patients had the unfettered choice among the competing systems, they would disproportionately choose to seek care at the UPMC Hospitals to the ultimate detriment of the Allegheny hospitals. That dynamic is what culminated in the financially perilous condition of the Allegheny hospitals before Highmark sought to acquire them.

10. The PID understood this. Indeed, in its Approving Order, the PID recognized that Highmark's plan (its "Base Case") was "premised on a non-continuation" of the existing UPMC commercial contracts and that continuation of such UPMC contracts may "delay [Allegheny's] financial recovery." Exhibit B, Approving Order at 15; see also Exhibit C, Findings of Fact and Conclusions of Law (PID Docket No. 1418) at 60 ¶ 243; Exhibit A, Compass Lexecon Rep. (PID Docket No. 1401) at 88 ("All of these projections rest on the assumption, among many, that UPMC will be out-of-network in Highmark's healthcare insurance plans after December 31, 2014."). *See also id.* at 94 ("[T]he success and impact of Highmark's affiliation with WPAHS depends critically on the ability of the IDN and Highmark to attract large numbers of inpatients away from UPMC to

WPAHS[.]”); *id.* at 13 (same); Exhibit C at ¶ 188 (“In order for Highmark’s IDN Strategy to work, it must (i) incentivize patients to select West Penn and other aligned hospitals instead of UPMC; and (ii) incentivize physicians to use West Penn and other aligned hospitals instead of UPMC. Unless those two goals are met, it is unlikely that Highmark can attract sufficient numbers of patients to West Penn to make the affiliation successful in terms of: (i) stabilizing West Penn[.]”)

11. Highmark, in fact, represented to the PID’s experts a “*firm belief* [] that UPMC would not agree to extend its provider contracts with Highmark if this Transaction occurs.” Exhibit A, Compass Lexecon Rep. (PID Docket No. 1401) at 159 (emphasis added). “*On this belief*, Highmark base[d] its” financial projections for the success of the affiliation “on the termination, without further extension, of its UPMC provider contract as of December 31, 2014.” *Id.* (emphasis added). The PID’s experts relied on Highmark’s alleged “firm belief,” stating that “the overall success of [Highmark’s] proposed [integrated delivery network] rests with the assumption that UPMC and Highmark would not extend their present contract beyond 2014 and UPMC would become a more expensive out-of-network option for Highmark policyholders.” *Id.* at 119.

12. Recognizing the deleterious impact that a new UPMC contract would have on Allegheny, the PID’s Approving Order required Highmark to provide the

Insurance Department with “updated information, based on reasonable assumptions and credible projections, on the impact of the terms of *any New UPMC Contract* on the financial performance of [Allegheny] as well as an independent analysis of an expert on the impact of the New Contract on both the insurance and provider markets in the region including but not limited to any effects on competition.” Exhibit B, Approving Order, ¶ 22A (emphasis added). Although PID set this condition to expire on December 31, 2018, it saw fit by mid-2017 to extend until through at least December 31, 2020. Exhibit D *See* Letter from T. Miller to J. Stover dated July 28, 2017 at 31.

13. Ultimately, Highmark’s decision to acquire the Allegheny hospitals have had two profound impacts, neither of which should redound to the detriment of non-Highmark Blues patients: (1) the UPMC Hospitals do not want to—and will not—provide Highmark with contracts that will facilitate the transfer of patients away from the UPMC Hospitals; and (2) even if Highmark had an unfettered ability to contract with the UPMC Hospitals (it does not, because of the PID’s Approving Order), Highmark would necessarily have to make the UPMC Hospitals unaffordable for its subscribers in order to tier and steer them into its Allegheny hospitals. These impacts do not apply to non-Highmark Blues.

C. The UPMC-Highmark Consent Decrees

14. Although Highmark had secured regulatory approval to build out its integrated system in April 2013, Pennsylvania officials still looked to postpone the inevitable termination of the UPMC-Highmark relationship in Allegheny County and Erie County, the areas where UPMC and Highmark were competing directly. In 2014, Pennsylvania officials negotiated two nearly identical five-year consent decrees, one with UPMC and one with Highmark (collectively, the “Consent Decree”).

15. The Consent Decree sets forth the terms under which Highmark’s subscribers can access certain transitional services at the UPMC Hospitals. Under most circumstances, those services are available to both Highmark subscribers and non-Highmark Blues patients on an in-network basis.

16. In accordance with the Consent Decree, UPMC and Highmark resolved a dispute about reimbursement rates through baseball arbitration. The arbitration panel chose Highmark’s submission, so the current reimbursement rates for the UPMC Hospitals were proposed by Highmark itself. When UPMC treats a non-Highmark Blues patient on an in-network basis, the patient’s home plan reimburses UPMC at those rates.

17. On June 30, 2019, the Consent Decree will expire. As of that date, non-Highmark Blues patients, absent the narrow exceptions identified in

Footnote 2, will no longer be able to access the UPMC Hospitals on an in-network basis.⁴

D. The Blues' Rules Prevent Direct Contracting with Providers Outside of Their Service Areas.

18. The Blues' License Agreements with the Blue Cross Blue Shield Association (BCBSA) grant each Blue the exclusive right to use the Blue Cross and/or Blue Shield brand(s) within its "Service Area." *In re Blue Cross*, 308 F. Supp. 3d at 1251.

19. The License Agreements also prohibit the Blues from contracting with healthcare providers outside their exclusive Service Areas, other than in counties or other similar areas contiguous to a Blue's Service Area "for limited purposes." *In re Blue Cross*, 308 F. Supp. 3d at 1251.

20. Under these rules, the Blues are prohibited from contracting outside their Service Areas with healthcare providers who would otherwise be sought out by their members, as was demonstrated early on in this litigation by Blue Cross & Blue Shield of Kansas City's refusal to contract with Provider Plaintiff Kathleen Cain, M.D. because she was just barely more than one county away from its Service Area. *See* Opposed Emergency Motion of Plaintiff Kathleen Cain, M.D. for Preliminary Injunction Against Defendant Blue Cross & Blue Shield of Kansas

⁴ As this Motion is limited to certain UPMC facilities, this discussion does not apply to other UPMC hospitals located in the service area of Capital Blue Cross. A non-Highmark Blues patient can access those hospitals through Capital as the host plan.

City (Dkt. #240), at 1–2. A similar situation occurred locally when Blue Cross and Blue Shield of Alabama was forced to terminate its provider agreement with the North Mississippi Medical Center in Tupelo based on the same rules.⁵

E. UPMC Has Attempted to Contract Directly with the Out-of-Area Blues.

21. Despite its longstanding issues with Highmark, UPMC has attempted to separately contract with other Blues. Beginning in May 2014, UPMC offered to enter into in-network contracts with all of the non-Highmark Blues. Exhibit E, Letters from D. Farner to BCBSA Plans dated May 14 and 15, 2014.

22. Within a week, BCBSA responded to UPMC’s May 14 and 15 letters on behalf of all the Blues’ Plans declining UPMC’s offer: “The License Agreements and related rules provide that Plans may generally only contract on a Blue basis with providers in their respective service areas. Your invitation to contract is therefore one that Blue Plans cannot accept.” Exhibit F, Letter from S. Nehs to D. Farner dated May 20, 2014.

23. A number of other Blues also responded separately to note that the Blues’ rules and license agreements prohibited them from contracting with UPMC. For instance, Anthem’s New Hampshire plan responded, “according to BCBS Association guidelines, a Blues plan cannot contract directly with a facility or

⁵ The UPMC Hospitals will submit evidence on this point separately, so that this motion need not be filed under seal.

provider that is more than one contiguous county away from the home state of that Blues plan.” Exhibit G, Email from R. Noonan to D. Farner dated May 22, 2014. Anthem’s Connecticut plan responded, “we are not at liberty to enter into such an agreement pursuant to requirements imposed by the Association on Blue Plan licensees.” Exhibit H, Letter from A. Jarvis to D. Farner dated July 31, 2014. Blue Cross and Blue Shield of Alabama advised that “[a]s a member of the Blue Cross Blue Shield Association, we cannot contract directly with providers not in our service area.” Exhibit I, Letter from D. McIntyre to D. Farner dated Aug. 7, 2014.

24. HealthNow, which operates under the Blue Brands in western New York, has a contiguous-county contract with UPMC Hamot, a UPMC hospital in Erie County, Pennsylvania. During negotiations regarding post-Consent Decree contracts, HealthNow advised UPMC Hamot that the BlueCard program would not apply to the contract, i.e., Highmark members will not be able to access UPMC Hamot and its physicians on an in-network basis. Email from E. Flanigan to M. Lewis dated Dec. 14, 2017.

25. In 2018, following the Order in this case that the Blues’ market allocation agreements would be evaluated under the *per se* rule, UPMC renewed its offer to contract directly with all the Blues. Exhibit J, Letters from D. Farner to BCBSA Plans dated April 23, 2018.

26. In response, Highmark sent a letter to its fellow Blues steering those members to its own Allegheny Health facilities and stating that the Blue Cross rules “allow our system to work for the benefit of all our members.” The letter shrugs off “suggestions of antitrust violations.” Exhibit K, Letter from D. Rice to BCBSA Members dated May 1, 2018.

27. No response was received by UPMC to its April 23 offer to the non-Highmark Blues.

28. UPMC has made clear that it is willing to contract with these out-of-area Blue Cross entities, like HealthNow, at the rates that Highmark proposed, and the arbitration panel approved. Exhibit L, Letter from D. Farner to BCBSA Members dated July 30, 2014.

29. UPMC recently made clear again to HealthNow that it is willing to contract with it for all of UPMC’s facilities. Exhibit M, Email from J. Chuba to R. Mornelli dated Feb. 4, 2019.

30. The average non-Highmark Blues patient does not know that UPMC has offered contracts to each of these plans and been turned down because the Blues’ illegal market allocation prevents them entering into such an agreement with UPMC. At least one Pennsylvania commentator with “out of market Blues Cross/Blue Shield insurance” noted that UPMC is a “loser in the court of public

opinion.” Exhibit N, <https://www.goerie.com/opinion/20190210/pat-howard-attorney-general-upmc-playing-hardball>.

31. Indeed, earlier this month, the Pennsylvania Attorney General filed suit against UPMC, based in part on UPMC’s lack of a contract with non-Highmark Blues. On February 7, 2019, the Pennsylvania Attorney General filed a Petition to Modify the Consent Decree governing the relationship between UPMC and Highmark. That petition is pending in the Commonwealth Court of Pennsylvania, Case No. 334 M.D. 2014. The petition seeks to impose penalties on UPMC for, among other things, not providing services on an in-network basis to members of non-Highmark Blues. Because UPMC is willing to contract with non-Highmark Blues at its current rates, this situation is the fault of the non-Highmark Blues, who have agreed not to contract with UPMC.

F. Without Injunctive Relief, the UPMC Hospitals Will Suffer Irreparable Harm.

32. The Blues’ unlawful territorial restriction conspiracy injures the UPMC Hospitals’ national and international reputation, and their relationships with their patients.

33. The UPMC Hospitals treats thousands of patients who are members of Blues other than Highmark. These non-Highmark Blues patients represent a significant portion of the UPMC Hospitals’ Blues patients. Some of these patients

travel to the UPMC Hospitals for treatment based on the Hospitals' extraordinary reputation, and some reside in the Pittsburgh area.

34. Notice of the impending change in Highmark's network has been well publicized in western Pennsylvania but is only now making its way to many non-Highmark Blues patients who seek their treatment at the UPMC Hospitals.

35. For instance, Patient A, a HealthNow member, has been treated for many years at UPMC Hospitals in Allegheny County for Systemic Scleroderma. As of July 2019, Patient A will no longer be able to access the UPMC Hospitals on an in-network basis because of the Blues' unlawful market allocation agreement. Patient A currently travels, at her own expense, to Pittsburgh to be treated at "one of the top 5 leading hospitals for the treatment of Schleroderma [sic] in the Country." According to Patient A, no doctor in Buffalo (where Patient A resides) is willing to treat her, much less undertake the numerous procedures performed by the UPMC Hospitals. Patient A looked into changing insurance coverage to be able to access UPMC, but none of the options available covered the patient's medications or other medical needs. To date, HealthNow has not directly contracted with the UPMC facilities where Patient A receives treatment.

36. Anthem has a number of service areas, including its Ohio service area, which is on the western border of Pennsylvania. Anthem patients routinely obtain treatment at the UPMC Hospitals. For example, Patient B, sought treatment at

UPMC Presbyterian Shadyside for an acoustic neuroma, a noncancerous (benign) tumor on the eighth cranial nerve, the vestibulocochlear nerve. This nerve leads from the brainstem to the ear and is involved in hearing and maintaining balance. Patient B currently resides in southern California, but grew up in Pittsburgh and visits a few times per year. Patient B's physician recommended a Gamma Knife® procedure. As the nation's leading provider of Gamma Knife® procedures, UPMC has treated more than 15,000 patients with brain tumors, vascular malformations, pain, and other functional problems. The Center for Image-Guided Neurosurgery at UPMC is the nation's leading provider of Gamma Knife® procedures, and is a major teaching center for neurosurgeons, radiation oncologists, and medical physicists from around the globe. Patient B selected UPMC to perform the Gamma Knife® procedure. However, according to Patient B, "[a]fter an exhaustive series of conversations with Anthem Blue Cross, they have denied my wish to seek treatment from you and UPMC because they feel there are services in [California] that fulfill my needs. I intend to appeal their decision, but in the meantime my tumor isn't getting any smaller." After this finding by Anthem, Patient B's physician recommended a doctor in California and stated, "[y]ou are yet one more regrettable casualty of the UPMC [Blue Cross] Insurance war." Patient B wondered, "[a]t first Anthem and Blue Card said you and UPMC were in network, but Highmark said UPMC was OON. After that, Anthem changed their tune...I

pay a lot of money for a PPO. Anthem said all clear for you and UPMC on 3 occasions. You said I was a good candidate for your treatment. Why does Highmark get to decide whether or not my insurance can pay you for my treatment?” Patient B did not receive Gamma Knife® from UPMC Presbyterian Shadyside. Anthem has rejected offers to directly contract with UPMC due to Blue Cross Blue Shield rules.

37. Patient C, from Atlanta, Georgia, had an esophageal perforation, and went to UPMC for a second opinion and to proceed with necessary additional surgery. Patient C is insured by Anthem Blue Cross Blue Shield of Georgia. Patient C’s previous surgery had not properly healed in over a year, and UPMC providers recommended an esophagoscopy and dilation for Patient C. Highmark deemed Patient C’s procedure out of network (outside of the Consent Decree). For Patient C to be treated at UPMC Patient C will have to pre-pay and seek reimbursement from Anthem. Anthem has rejected offers to directly contract with UPMC due to the Blue Cross Blue Shield rules.

38. In UPMC’s experience, when a UPMC facility or provider changes status from in-network to out-of-network with a health plan, the volume of patients from that health plan who utilize UPMC falls dramatically. Among the reasons are that the cost to the patient is higher, and that UPMC requires payment in advance—a policy adopted because Highmark refused a request by the

Commonwealth of Pennsylvania to pay UPMC directly for out-of-network services.

39. The Blues' agreement to restrict one another's ability to contract directly with out-of-area providers hurts the reputation of the UPMC Hospitals, making it appear UPMC is unwilling to do business with these Blues, when in fact it is the Blues' anticompetitive rules that dictate the outcome. Each day that passes, especially when the Consent Decree expires, the UPMC Hospitals lose patients and see their reputation further suffer. UPMC also unfairly risks substantial penalties from the Pennsylvania Attorney General's suit, even though UPMC has attempted to contract with non-Highmark Blues.

ARGUMENT

A. Elements for the Issuance of a Preliminary Injunction

This Court has broad discretion to grant a preliminary injunction. *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1310 (11th Cir. 1999). Injunctive relief is available under Section 16 of the Clayton Act when a plaintiff "demonstrate[s] a significant threat from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

To support a preliminary injunction, a district court need not find that the evidence positively guarantees a final verdict in the plaintiff's favor. *Levi Strauss*

& Co. v. Sunrise Int’l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995). Instead, “[a] preliminary injunction may be entered when a plaintiff establishes four elements: ‘(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest.’” *Friedenberg v. Sch. Bd. of Palm Beach County*, 911 F.3d 1084, 1090 (11th Cir. 2018) (quoting *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002)).

The first factor—likelihood of prevailing on the merits—is the most important. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005); *U.S. v. Oates*, 5:12-CR-283-KOB-TMP, 2013 WL 2450719, at *4 (N.D. Ala. May 23, 2013).

B. UPMC Is Likely To Prevail On Its Claims

“A substantial likelihood of success on the merits requires a showing of only *likely* or probable, rather than *certain*, success.” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005). This Court has determined “that Defendants’ aggregation of a market allocation scheme together with certain other output restrictions is due to be analyzed under the *per se* standard of review.”

Memorandum Opinion Section 1 Standard of Review and Single Entity Defense

(“Standard of Review Order”), Doc. 2063, at 59.⁶ Given the Court’s determination that the Blues’ market allocation scheme and other related conduct is subject to the *per se* standard, the likelihood that UPMC will prevail on the merits is extraordinarily high.

“The *per se* rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score.” *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362–63 (5th Cir. 1980). *See also Natl. Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 598 (11th Cir. 1986) (quoting *U.S. v. Realty Multi-List, Inc.*); *Langston Corp. v. Stand. Register Co.*, 553 F. Supp. 632, 638 (N.D. Ga. 1982) (holding that if the conspiracy constitutes a *per se* violation, the plaintiff “need not introduce evidence of anticompetitive effect to obtain injunctive relief”). The only question is whether the Defendants agreed to the market allocation scheme “because the unreasonableness of the restraint is presumed.” *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1546 (11th Cir. 1996). Yet, in this case, even the Defendants’ agreement to allocate markets is not in dispute:

[E]ach Plan has signed a License Agreement with the Association. Each of these License Agreements identifies an exclusive “service area” where a Member Plan may use the Blue Marks....Under the License Agreements, subject to certain exceptions related to National Accounts and Government Programs, the Plans agreed that a “Plan may not use the Licensed Marks and Name outside the Service Area....”...Also under the License Agreements, the Association’s

⁶ The Eleventh Circuit declined Defendants’ request for interlocutory review on December 12, 2018.

rules, or both, a plan generally may not develop a provider network or contract with a healthcare provider outside its service area for services to be provided under the Blue Marks....A Plan may also contract with certain types of providers nationwide, such as laboratories, durable medical equipment providers, and specialty pharmacies, but medical professionals, hospitals, and outpatient facilities are not among these types.

In re Blue Cross, 308 F. Supp. 3d at 1251 (internal citations omitted). As this Court noted, evidence suggests that “apart from the Blue Plans’ ESAs ... the Blues would be competitors under the Blue brand in the health insurance market.” *Id.* at 1265.

The Court’s determination that the Blues’ conduct is subject to a *per se* standard is determinative in considering preliminary injunctive relief related to that conduct. After finding the plaintiff had demonstrated “a substantial likelihood of demonstrating [the defendants’ agreement] is a horizontal market allocation that is a *per se* violation of Section 1 of the Sherman Act,” the Court in *C-E Minerals, Inc. v. CARBO Ceramics, Inc.* found the plaintiff could easily establish irreparable injury and that the balance of harms favored the plaintiff: “As to antitrust law, the court’s ruling that Paragraph 5 is a *per se* violation essentially ends the inquiry.” No. 1:11-CV-02574-JOF, 2012 WL 13008801, at *5, 8 (N.D. Ga. Mar. 14, 2012). The Court’s determination that the Blues’ market allocation scheme is subject to *per se* treatment makes it extremely likely that UPMC will prevail on the merits

and would warrant injunctive relief even if UPMC's proof of irreparable injury was less compelling.

C. Without a Preliminary Injunction, the UPMC Hospitals Will Suffer Irreparable Harm.

Absent injunctive relief, irreparable injury is not only likely but inevitable. "Although economic losses alone do not justify a preliminary injunction 'the loss of customers and goodwill is an irreparable injury.'" *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F.3d 964, 970 (11th Cir. 2005) (quoting *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991)).

Defendants' refusal to allow the UPMC Hospitals to treat non-Highmark Blues patients will not only result in loss of patients but will also be detrimental to UPMC's reputation and goodwill. If injunctive relief is not granted, the UPMC Hospitals will lose in-network access to all non-Highmark Blues patients in the country solely as a result of Defendants' conspiracy, including patients like those described above. As the Court has recognized, the Blue Plans are not only pervasive but also dominant:

In 2015, fifteen of the Blue Plans were within the top twenty-five insurers in the United States as measured by total membership....Anthem was the second largest insurer in the country by membership and held Blue Cross and/or Blue Shield licenses in fourteen different states....HCSC was the fourth or fifth largest insurer in the country by membership and held Blue Cross and Blue

Shield licenses in five states....Other Blue Plans are among the top ten insurers by membership.

In re Blue Cross, 308 F. Supp. 3d at 1256–57. The UPMC Hospitals’ loss will include many of the 30,000 patients who travel to Pittsburgh for treatment each year, and the tens of thousands of non-Highmark Blues patients who live in western Pennsylvania, who will no longer be able to access the UPMC Hospitals on an in-network basis because of the Blues’ rules. *See Spiegel v. City of Houston*, 636 F.2d 997, 1001 (5th Cir. 1981) (recognizing that “the possibility of customers being permanently discouraged from patronizing one’s business” is irreparable injury that cannot be remedied by monetary damages). *See also Blaine v. N. Brevard County Hosp. Dist.*, 312 F. Supp. 3d 1295, 1306–07 (M.D. Fla. 2018) (finding that an inability to treat patients due to the defendants’ alleged antitrust violations constitutes “irreparable injury that cannot be monetized”). This loss constitutes a significant injury to the UPMC Hospitals.

While the loss of patients is itself an irreparable injury, the limitations on UPMC’s ability to treat non-Highmark Blues patients will also have a compounding effect that will irreparably harm the UPMC Hospitals’ reputation, goodwill, and relationships with other significant constituents. UPMC, a world-renowned non-profit health care provider, has made a commitment as well as significant investments in order to be able to provide premier healthcare services beyond the immediate Pittsburgh area. UPMC is not only committed to providing

needed healthcare services to the region but to patients throughout the country. UPMC operates 40 academic, community and special hospitals, 700 doctors' offices and outpatient sites, employs 4,800 physicians, and offers an array of rehabilitation, retirement, and long-term care facilities. Restrictions on UPMC's patient base necessarily also impact the ability of these professionals to provide needed medical services.

UPMC (and thus the UPMC Hospitals) depends on its excellent reputation to attract top-tier residents and fellows and to establish relationships with a broad range of referring physicians. Clearly, UPMC has multiple customers or constituents beyond simply the patients themselves. These relationships constitute a significant aspect of UPMC's goodwill.⁷ UPMC's carefully developed reputation of being an international, national and regional healthcare provider is crucial in developing and maintaining these various relationships. The inability of the UPMC Hospitals to treat any non-Highmark Blues patient on an in-network basis after June 30, 2019 significantly impacts not only UPMC's ability to attract

⁷ "Possibly the best known definition of good will is that of Justice Story:"

'Good will may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill, or influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' Story, Partnerships, § 99.

Masquelette's Est. v. C.I.R., 239 F.2d 322, 325–26 (5th Cir. 1956)

patients, but also UPMC's ability to attract physicians, fellows, residents, interns, referring physicians, and employees. The more confined the area from which these UPMC Hospitals attract their patient populations and the less diverse those populations, the less attractive these UPMC Hospitals are to each of these constituents. Further, many of these patients blame UPMC and the UPMC Hospitals for not contracting with their home Blue plan. Of course, the average Blue member does not know that UPMC has offered contracts to each of these plans and been turned down because the Blues' illegal market allocation agreement prevent them entering into such an agreement with UPMC. At least one Pennsylvania commentator with "out of market Blues Cross/Blue Shield insurance" noted that UPMC is a "loser in the court of public opinion." Fact 30.

Because the reputation of these UPMC Hospitals will be harmed by being foreclosed from treating non-Highmark Blues patients on an in-network basis, this harm will be long term, cannot be easily quantified, and cannot be addressed by money damages. The UPMC Hospitals' injuries are neither "remote nor speculative, but actual and imminent." *City of Jacksonville*, 896 F.2d at 1285 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 973 (2d Cir. 1989)). Moreover, the UPMC Hospitals' injuries are of the type the antitrust laws were enacted to prevent because they result directly from the Blues' conspiracy to illegally allocate markets.

The UPMC Hospitals cannot wait for trial. “A request for equitable relief invokes the district court’s inherent equitable powers to order preliminary relief ... in order to assure the availability of permanent relief.” *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995). The Defendants have proposed a schedule that would likely allow years to pass before a trial in the Alabama streamlined action. Even if the Provider Plaintiffs prevail at that trial, the Defendants will continue to insist that each additional market must be tried before relief can be awarded to parties such as the UPMC Hospitals. If the UPMC Hospitals’ injuries are not addressed until trial on the merits, the UPMC Hospitals will have lost patients and will have suffered irreparable harm to its reputation and goodwill.

D. Granting Injunctive Relief Would Impose No Hardship on Defendants

The balance of the harms clearly favors the UPMC Hospitals. The only harm Defendants will potentially suffer as a result of the requested injunctive relief is disruption of their *per se* illegal market allocation agreement. The UPMC Hospitals have treated non-Highmark Blues patients for years. In fact, for the next several months, the UPMC Hospitals will continue to treat these subscribers. Continuation of this treatment, at the same rates the non-Highmark Blues are already paying after June 30, 2019, cannot possibly harm Defendants. Yet, if relief is delayed, the UPMC Hospitals will suffer irreparable injury as a result of

Defendants’ continuing conduct that this Court has held to be subject to the *per se* standard of review.

E. The Public Interest Would Be Served By the Issuance of a Preliminary Injunction.

The public interest is unquestionably served by the entry of a preliminary injunction. “Consideration of the public interest is particularly appropriate in the context of a private antitrust suit where injunctive relief is sought.” *Bascom Food Products Corp. v. Reese Finer Foods, Inc.*, 715 F. Supp. 616, 640 (D.N.J. 1989) ((quoting *Paschall v. K.C. Star Co.*, 441 F. Supp. 349 (W.D. Mo. 1977)). Injunctive relief under the antitrust laws is not merely to protect private litigants but “to serve as well the high purpose of enforcing the antitrust laws.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969). *See also F.T.C. v. U. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991) (noting in an FTC action that “[t]he principal equity weighing in favor of issuance of the injunction is the public’s interest in effective enforcement of the antitrust laws....[that] are intended to safeguard competition and, hence consumers”); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1261 (7th Cir. 1980) (“[T]he entry of these injunctions serves a strong national interest in effective and meaningful enforcement of the American anti-trust laws.”) The public interest in enforcement of the antitrust laws will be served by preliminarily enjoining Defendants’ *per se* illegal conduct.

CONCLUSION

Because the UPMC Hospitals have met all four requirements for injunctive relief, the Court should enter an order preliminarily enjoining Defendants from enforcing or complying with their market allocation agreements.

Date: February 21, 2019

Respectfully submitted,

/s/ Edith M. Kallas

Edith M. Kallas – ***Co-Lead Counsel***
WHATLEY KALLAS, LLP
1180 Avenue of the Americas, 20th Floor
New York, NY 10036
Tel: (212) 447-7060
Fax: (800) 922-4851
Email: ekallas@whatleykallas.com

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr. – ***Co-Lead Counsel***
W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com

Patrick J. Sheehan
WHATLEY KALLAS, LLP
60 State Street, 7th Floor
Boston, MA 02109
Tel: (617) 573-5118
Fax: (617) 371-2950
Email: psheehan@whatleykallas.com

Deborah J. Winegard
WHATLEY KALLAS, LLP
1068 Virginia Avenue, NE
Atlanta, GA 30306
Tel: (404) 607-8222
Fax: (404) 607-8451
Email: dwinegard@whatleykallas.com

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

E. Kirk Wood, Jr. – ***Local Facilitating Counsel***
WOOD LAW FIRM LLC
P. O. Box 382434
Birmingham, AL 35238
Tel: (205) 612-0243
Fax: (205) 705-1223

Email: ekirkwood1@bellsouth.net

Charles Clinton Hunter
HAYES HUNTER PC
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (281) 768-4731
Fax: (713) 583-7047
Email: chunter@hayeshunterlaw.com

Aaron S. Podhurst – ***Plaintiffs’ Steering Committee***
Peter Prieto – ***Chair, Expert Committee***
PODHURST ORSECK, P.A.
One S.E. 3rd Avenue
Suite 2300
Miami, FL 33131
Tel: (305) 358-2800
Fax: (305) 358-2382
Email: apodhurst@podhurst.com
pprieto@podhurst.com

Dennis Pantazis – ***Plaintiffs’ Steering Committee***
Brian Clark – ***Discovery Committee***
WIGGINS CHILDS PANTAZIS FISHER
GOLDFARB
The Kress Building
301 Nineteenth Street North
Birmingham, AL 35203
Tel: (205) 314-0500
Fax: (205) 254-1500
Email: dgp@wcqp.com
bclark@wcqp.com

U.W. Clemon – ***Plaintiffs’ Steering Committee***
U. W. Clemon, LLC
5202 Mountain Ridge Parkway
Birmingham, AL 35222
Tel: (205) 837-2898
Email: clemonu@bellsouth.net

Dennis C. Reich – ***Chair, Damages Committee***
REICH & BINSTOCK, LLP
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (713) 622-7271
Fax: (713) 623-8724
Email: dreich@rbfirm.net

J. Mark White – ***Litigation Committee***
Augusta S. Dowd – ***Chair, Litigation Committee***
Linda G. Flippo – ***Discovery Committee***
WHITE ARNOLD & DOWD, P.C.
The Massey Building
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Tel: (205) 323-1888
Fax: (205) 323-8907
Email: mwhite@whitearnolddowd.com
adowd@whitearnolddowd.com
lflippo@whitearnolddowd.com

Nicholas B. Roth – ***Chair, Discovery Committee***

Julia Smeds Roth – ***Discovery Committee***
EYSTER KEY TUBB ROTH
MIDDLETON
& ADAMS, LLP
402 East Moulton Street, SE
Decatur, AL 35602
Tel: (256) 353-6761
Fax: (256) 353-6767
Email: nbroth@eysterkey.com
jroth@eysterkey.com

David A. Balto – ***Expert Committee***
THE LAW OFFICES OF DAVID A.
BALTO
1350 I Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 789-5424
Fax: (202) 589-1819
Email: david.balto@dcantitrustlaw.com

Joey K. James – ***Litigation Committee***
BUNCH & JAMES
P. O. Box 878
Florence, AL 35631
Tel: (256) 764-0095
Fax: (256) 767-5705
Email: joey@bunchandjames.com

Richard S. Frankowski – ***Discovery Committee***
THE FRANKOWSKI FIRM, LLC
231 22nd Street South, Suite 203
Birmingham, AL 35233
Tel: (205) 390-0399

Van Bunch – ***Chair, Class Certification Committee***

BONNETT FAIRBOURN FRIEDMAN &
BALINT, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Tel: (602) 274-1100
Fax: (602) 274-1199
Email: vbunch@bffb.com

Robert J. Axelrod – ***Chair, Written Submissions Committee***
AXELROD & DEAN LLP
830 Third Avenue, 5th Floor
New York, NY 10022
Tel: (646) 448-5263
Fax: (212) 840-8560
Email: rjaxelrod@axelroddean.com

W. Daniel Miles, III – ***Written Submissions Committee***
BEASLEY ALLEN CROW METHVIN
PORTIS
& MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Tel: (800) 898-2034
Fax: (334) 954-7555
Email: dee.miles@beasleyallen.com

Michael C. Dodge – ***Expert Committee***
GLAST PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Tel: (972) 419-7172
Email: mdodge@gpm-law.com

Fax: (205) 390-1001
Email: richard@frankowskifirm.com

John C. Davis – ***Written Submissions Committee***
LAW OFFICE OF JOHN C. DAVIS
623 Beard Street
Tallahassee, FL 32303
Tel: (850) 222-4770
Email: john@johndavislaw.net

Michael E. Gurley, Jr. – ***Discovery Committee***
Attorney at Law
24108 Portobello Road
Birmingham, AL 35242
Tel: (205) 908-6512
Email: mgurleyjr@yahoo.com

Mark K. Gray – ***Discovery Committee***
GRAY & WHITE
713 E. Market Street, Suite 200
Louisville, KY 40202
Tel: (502) 805-1800
Fax: (502) 618-4059
Email: mgray@grayandwhitelaw.com

Lynn W. Jinks, III – ***Expert Committee***
Christina D. Crow – ***Discovery Committee***
JINKS CROW & DICKSON, P.C.
219 North Prairie Street
Union Springs, AL 36089
Tel: (334) 738-4225
Fax: (334) 738-4229
Email: ljinks@jinkslaw.com
ccrow@jinkslaw.com

Stephen M. Hansen – ***Class Certification Committee***
LAW OFFICE OF STEPHEN M.
HANSEN
1821 Dock Street
Tacoma, WA 98402
Tel: (253) 302-5955
Fax: (253) 301-1147
Email: steve@stephenmhansenlaw.com

Myron C. Penn – ***Discovery Committee***
PENN & SEABORN, LLC
53 Highway 110
Post Office Box 5335
Union Springs, AL 36089
Tel: (334) 738-4486
Fax: (334) 738-4432
Email: myronpenn28@hotmail.com

Harley S. Tropin – ***Damages Committee***
Javier A. Lopez – ***Discovery Committee***
KOZYAK TROPIN &
THROCKMORTON, P.A.
2525 Ponce De Leon Boulevard, 9th Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: hst@kttlaw.com
jal@kttlaw.com

C. Wes Pittman – ***Settlement Committee***
THE PITTMAN FIRM, P.A.
432 McKenzie Avenue
Panama City, FL 32401
Tel: (850) 784-9000
Fax: (850) 763-6787
Email: wes@pittmanfirm.com

Robert B. Roden – ***Litigation Committee***
SHELBY RODEN, LLC
2956 Rhodes Circle
Birmingham, AL 35205
Tel: (205) 933-8383
Fax: (205) 933-8386
Email: rroden@shelbyroden.com

Gary E. Mason – ***Class Certification Committee***
WHITFIELD BRYSON & MASON, LLP
1625 Massachusetts Ave. NW, Suite 605
Washington, DC 20036
Tel: (202) 429-2290
Fax: (202) 640-1160
Email: gmason@wbmlp.com

J. Preston Strom, Jr. – ***Litigation Committee***
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard, Suite A
Columbia, SC 29204-3905
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com

Thomas V. Bender – ***Discovery Committee***
Dirk L. Hubbard
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Tel: (816) 421-0700
Email: tbender@hab-law.com
dhubbard@hab-law.com

Gregory S. Cusimano – ***Litigation Committee***
CUSIMANO, ROBERTS & MILLS, LLC
153 South 9th Street
Gadsden, AL 35901
Phone: (256) 543-0400
Fax: (256) 543-0488
Email: greg@alalawyers.net

Brian E. Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 N. Miles Street
Appleton, MN 56208
Tel: (320) 289-2363
Fax: (320) 289-2369
Email: brian@wojtalewiczlawfirm.com

Michael L. Murphy – ***Discovery Committee***
BAILEY GLASSER LLP
910 17th Street, NW, Suite 800
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: mmurphy@baileyglasser.com

Lance Michael Sears
SEARS & SWANSON, P.C.
First Bank Building
2 North Cascade Avenue, Suite 1250
Colorado Springs, CO 80903
Tel: (719) 471-1984
Fax: (719) 577-4356
Email: lance@searsassociates.com

Jessica Dillon
Ray R. Brown
Molly Brown
DILLON & FINDLEY, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 277-5400
Fax: (907) 277-9896
Email: Jessica@dillonfindley.com
Ray@dillonfindley.com
Molly@dillonfindley.com

Cynthia C. Moser
HEIDMAN LAW FIRM
1128 Historic 4th Street
P. O. Box 3086
Sioux City, IA 51101
Tel: (712) 255-8838
Fax (712) 258-6714
Email: Cynthia.Moser@heidmanlaw.com

Archie C. Lamb, Jr.
ARCHIE LAMB & ASSOCIATES, LLC
301 19th Street North, Suite 585
The Kress Bldg.
Birmingham, AL 35203-3145
(205) 458-1210
Email: alamb@archielamb.com

Paul Lundberg
LUNDBERG LAW, PLC
600 4TH Street, Suite 906
Sioux City, IA 51101
Tel: (712) 234-3030
Fax: (712) 234-3034
Email: paul@lundberglawfirm.com

Gwen Simons
Simons & Associates Law, P.A.
P.O. Box 1238
Scarborough, ME 04070-1238
Tel: (207) 205-2045
Fax: (207) 883-7225
Email: gwen@simonsassociateslaw.com

Attorneys for Intervenor

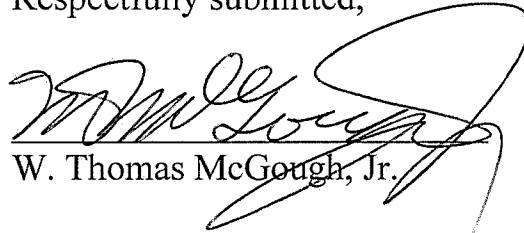
VERIFICATION OF W. THOMAS MCGOUGH, JR.

I, W. Thomas McGough, Jr. declare and verify:

1. I am employed as Executive Vice President and Chief Legal Officer by the University of Pittsburgh Medical Center.
2. I verify that the foregoing Verified Motion for and on behalf of certain UPMC facilities was duly prepared under my direction; that the facts stated therein have been assembled by authorized employees and counsel for UPMC and that the allegations therein are true and correct to the best of my knowledge, information and belief.
3. I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

Executed in Pittsburgh, PA on February 21, 2019.

Respectfully submitted,


W. Thomas McGough, Jr.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 21st day of February 2019 electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.